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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 647

BATES MANUFACTURING COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 24, 1937.

CERTIORARI GRANTED JANUARY 31, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 3580. Law Docket

BATES MANUFACTURING COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed March 21, 1929

Now comes the petitioner in the above-entitled matter and says:

1. The petitioner is and was at all times relevant to the matters herein complained of a corporation duly organized according to law and having an usual place of business on Congress Street, Boston, in the District of Massachusetts.

2. This action is brought against the United States of America in the United States District Court for the District [fol. 2] of Massachusetts, said court having jurisdiction of the matters herein complained of by the petitioner.

3. The said action is one to recover back federal war profits taxes, excess profits taxes and income taxes for the taxable periods ending December 31, 1917, December 31, 1918, December 31, 1919, December 31, 1920 and December 31, 1921, respectively; which the petitioner alleges were erroneously and illegally assessed against and paid by the petitioner, and is an action arising out of the laws of the United States providing for internal revenue; the Collectors of Internal Revenue who collected the said taxes are not now in office.

4. All returns, payments, claims for refund, and other action requisite to this suit have been duly made and filed in due season, and the claims for refund as to the matters herein complained of have been denied or rejected by the Commissioner of Internal Revenue.

5. The dates of filing of all returns; the dates and amounts of all payments; the dates of the claims for refund, and the dates of the rejections or denials of the said claims

for refund are hereto detailed and enumerated in a schedule hereto annexed and marked "A".

6. The petitioner claims a refund in the sum of $47,468.15 for the taxable period ending December 31, 1917, paid as part of the original and subsequent profits and income taxes for that year, upon the following grounds:

That the Commissioner by his agents in computing the invested capital upon which computation the said taxes hereinbefore referred to were assessed against and paid by the petitioner settled the value for the lands, buildings, machinery and like tangible property in the sum of $4,278,-269.56 less reserve of $1,446,514.73, all of which is fully itemized in a schedule hereto annexed and marked "B"; that the petitioner alleges that the correct value for the said lands, buildings, machinery, and like tangible property is the sum of $5,562,068.32 less reserve of $1,605,-126.99, which further appears fully itemized in said schedule hereto annexed marked "B".

That the Commissioner by his agents incorrectly and erroneously arrived at the said value so computed by him or his agents for the following reasons:

(a) The Commissioner improperly and illegally refused [fol. 3] to allow restorations to invested capital for the period from the year 1856 to and including the year 1916, less a proper depreciation thereon;

(b) That the current depreciation when correctly determined should have been made on the sum of $3,956,941.33—net, instead of the improper rate of depreciation which the Commissioner by his agents allowed on the sum of $2,831,-754.83—net;

(c) That the Commissioner by his agents has refused to accept the valuation of the property hereinbefore referred to, to wit, buildings, machinery and like tangible property as of the date of March 1, 1913, in the determination of the amount of depreciation solely, which the petitioner alleges it was entitled to, and which refusal by the said Commissioner by his agents the petitioner alleges was prejudicial error.

(d) That the Commissioner by his agents refused to allow the petitioner an accentuated or accelerated rate of depreciation for the said taxable period which rate the petitioner alleges it was entitled to for the reason that during the said

taxable period the petitioner suffered from innumerable abnormal conditions of exhaustion, wear and tear.

7. The petitioner claims a refund of $88,630.00 for the taxable period ending December 31, 1918, paid as part of the original and subsequent profits and income taxes for that year, for the same grounds assigned as error in the preceding paragraph and subdivisions thereof.

8. The petitioner claims a refund of $59,838.31 for the taxable period ending December 31, 1919, paid as part of the original and subsequent profits and income taxes for that year, for the same grounds assigned as error in paragraph 6 and subdivisions thereof.

9. The petitioner claims a refund of $1,000 for the taxable period ending December 31, 1920, paid as part of the original and subsequent profits and income taxes for that year, for the same grounds assigned as error in paragraph 6 and subdivisions thereof.

10. The petitioner claims a refund of $116,413.25 for the taxable period ending December 31, 1921, paid as part of the original and subsequent profits and income taxes for that year, for the same grounds assigned as error in paragraph 6 and subdivisions thereof.

[fol. 4] 11. That in the whole premises referred to herein the Commissioner by his agents wholly acted in an arbitrary and improper manner and grossly erred in the particulars specifically assigned herein and generally in the interpretation of the laws pertaining hereto and demanded of the petitioner an impossible measure of proof of its contentions which was never contemplated and which cannot be fairly inferred to result from a reasonable and proper construction of the Internal Revenue Acts as enacted by the Congress of the United States.

Wherefore the petitioner prays judgment herewith for the said sums of $47,468.15, $88,630, $59,838.31, $1,000 and $116,413.25, with interest on the said sums from the dates upon which the said sums were paid; and its reasonable costs of this suit.

By its Attorneys, Goulston & Storrs, David H. Greenberg.

Duly sworn to by H. de F. Lockwood. Jurat omitted in printing.

Exhibit "A" to Petition

Dates of Filing:

Calendar Year	1917	filed on or before		June 1, 1918
" "	1918	" " "	"	June 15, 1919
" "	1919	" " "	"	Mar. 15, 1920
" "	1920	" " "	"	Mar. 15, 1921
" "	1921	" " "	"	Mar. 15, 1922

[fol. 5]

Payments were as follows:	Date of Payment	Amount of Tax
1917 Paid in 1918—Acct. No. 1752677	$106,091.27	
Additional—August, 1919, P. 27—L. 9	16,415.37	
Amended return September, 1921, P. 75—L. 7 Rev. Agts. Rpt.	9,756.68	
Total	$134,177.57	
Refunded—1927—August	4,540.38	
Net Tax Paid		$129,637.19
1918 In installments—final Return		
1919—Account No. 401277 Total	$664,227.21	
Additional—Sept. 1921 P. 75—L. 7 Rev. Agts. Rpt.	76,852.33	
Total	$741,079.54	
Refunded—August 1927	18,732.42	
Net Tax Paid		$722,347.12
1919 Paid original return—quarterly installments Account No. 408789 June 1920	327,842.59	
Additional—Sept. 1921—P. 75—L. 9 Rev. Agts. Rpt.	36,326.07	
Total	$364,168.66	
Less: Refund—August 1927	13,510.75	
Net Tax Paid		350,657.91
1920 Tax original return—installments 1921, Account No. 406253	$50,229.07	
Refund—August 1927	324.63	
Net Tax Paid		49,904.44

[fol. 6]

	Date of Payment	Amount of Tax
Payments—1921 Tax original return		
Paid 1922—installments		
Account No. 411250	$489,541.31	
Refund—August 1927	4,198.47	
Net Tax Paid		$485,342.84

Refund Claims were filed as follows:

Date of Filing	Year Involved	Amount
3/11/24	1917	$75,000.00
3/11/24	1918	250,000.00
9/15/24	1917	47,468.15
9/15/24	1918	88,680.00
9/15/24	1919	59,838.31
9/15/24	1921	116,413.25
3/31/25	1917	40,000.00
3/31/25	1918	80,000.00
3/31/25	1919	40,000.00
4/12/26	1920	$1.00*
4/12/26	1921	$1.00*

* Or more.

Waivers were filed June 15, 1924 for the years 1917, 1918 and 1919.

Renewal Waivers were filed June 15, 1925 for the years 1917, 1918 and 1919.

Both of the above were filed under authority of Special Acts of Congress.

Previously, original Waiver for 1917 only was filed in 1923.

Dates of rejection of Refund Claims were as follows:

The five years were rejected March 22, 1927, although Overassessment Certificates were not received until August, 1927—Rejection Schedule No. 24,683.

[fol. 7] EXHIBIT "B" TO PETITION

Valuation of Land, Buildings, Machinery and Like Tangible Property

	Revenue Department's Valuation	Corporation's Contention for Valuation
Land	$236,378.68	$377,456.80
Bldgs.	2,089,700.05	2,790,494.61
Mchy Equip. & Looms	1,845,762.12	2,394,116.91
Looms	106,428.71	0
Total	4,278,269.56	5,562,068.32
Less: Reserve	1,446,514.73	1,605,126.99
Net	$2,831,754.83*	$3,956,941.33*

* Amounts in dispute. Above starting point January 1, 1917, as adjusted by subsequent years to affect all five years.

Above on cost basis 1913 increase also in dispute.

Foregoing certified to as correct.

JAINE V. GILLIN, C.P.A.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF SERVICE—Filed March 28, 1929

David H. Greenberg, being first duly sworn, deposes and says that he is one of counsel for the foregoing petitioner and that on March 25, 1929, he personally served upon the United States District Attorney for the District of Massachusetts, at his office in the United States Courts and Post Office Building, Boston, the within contained notice and copy of petition; and that on said twenty-fifth day of March, 1929, he thereupon mailed a copy of said notice and petition to the Attorney General of the United States at Washington, all in the form and manner as required by law.

David H. Greenberg, One of Counsel for Petitioner.

[fol. 8] Subscribed to and sworn before me this twenty-sixth day of March, 1929. Elizabeth P. Weber, Notary Public. (Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PETITION

SIRS:

Please take notice that the within petition was duly filed with the Clerk of the District Court of the United States for

the District of Massachusetts on the 22nd day of March, 1929, which Court has jurisdiction of the cases therein set forth and in which district the plaintiff has an usual place of business.

Boston, March 23, 1929.

——— ———, Attorneys for Petitioner, 80 Federal St., Boston, Mass.

To the Honorable the Attorney General of the United States, and to the Honorable the Attorney of the United States for the District of Massachusetts.

In United States District Court

Answer—Filed May 16, 1929

Now comes the defendant in the above-entitled action and denies each and every material allegation, item, count and particular in the petitioner's petition contained.

By its Attorneys, Frederick H. Tarr, United States Attorney, by J. Duke Smith, Special Assistant to the United States Attorney.

Recitals as to Proceedings

This cause was thence continued from term to term to the December Term, A. D. 1931, when, to wit, January 2, 1932, this cause was dismissed without prejudice and without [fol. 9] costs for lack of prosecution under general order of September 19, 1922.

At the September Term, A. D. 1934, to wit, October 16, 1934, a petition for leave to file a bill of review was filed and allowed.

At the March Term, A. D. 1935, to wit, May 28, 1935, said cause was restored and reopened by the final decree entered in case No. 4049, Equity, Bates Manufacturing Company v. United States of America on the twenty-eighth day of May, A. D. 1935.

This cause was thence continued from term to term to the December Term, A. D. 1936, when, to wit, December 29, 1936, a motion was filed by the plaintiff to exempt case from the operation of Rule 34, and allowed by the court.

IN UNITED STATES DISTRICT COURT

RESPONDENT'S MOTION TO DISMISS—Filed May 4, 1937

Now comes the respondent above-named, by Francis J. W. Ford, United States Attorney for the District of Massachusetts, and Arthur L. Murray, Special Assistant to said United States Attorney, its attorneys, and respectively moves the court to dismiss the petition herein filed, and as grounds for said motion says:

1. That this court is without jurisdiction to hear and determine this cause of action instituted against the above-named respondent, in that the cause of action set forth in the petition filed herein is barred by the provisions of Section 3226 of the Revised Statutes of the United States, as amended by Section 1113 (a) of the Revenue Act of 1926.

Wherefore, the respondent prays the judgment of this court and that the petitioner may be barred from maintaining this action against the respondent.

Job No. 3897 Supreme Court Record No. 647

Francis J. W. Ford, United States Attorney, by Arthur L. Murray, Special Assistant to the United States Attorney.

[fol. 10] RECITAL AS TO FURTHER PROCEEDINGS

At the same term, to wit, May 11, 1937, said cause was set down for hearing on the respondent's motion to dismiss for lack of jurisdiction, the Honorable George C. Sweeney, District Judge, sitting.

Said cause was thence taken under advisement and on the eighteenth day of June, A. D. 1937, a memorandum of the court was announced allowing the respondent's motion to dismiss.

On the said eighteenth day of June, A. D. 1937, plaintiff excepted to the allowance of the motion of the United States to dismiss and to the finding and ruling that the court has no jurisdiction.

This cause was thence continued to the present June Term, A. D. 1937, when, to wit, July 1, 1937, a plaintiff's bill of exceptions is filed and assented to, said bill of exceptions being allowed by the court on July 20, 1937.

IN UNITED STATES DISTRICT COURT

RESPONDENT'S MOTION FOR JUDGMENT FORTHWITH—Filed and Allowed July 20, 1937

Now comes the respondent, in the above-entitled action, and moves that judgment be entered for the respondent forthwith.

By its Attorney, Francis J. W. Ford, United States Attorney, by Arthur L. Murray, Special Assistant to the United States Attorney.

7, 20, 37. Geo. C. Sweeney.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Thereupon, to wit, July 20, 1937, it is considered by the court, the Honorable George C. Sweeney, District Judge, sitting, that the said United States of America, defendant, recover of the Bates Manufacturing Company, plaintiff, its costs of suit taxed at —.

IN UNITED STATES DISTRICT COURT

CLAIM OF APPEAL AND ALLOWANCE THEREOF

From the foregoing judgment, the Bates Manufacturing Company, plaintiff, claims an appeal to the United States Circuit Court of Appeals for the First Circuit on July 20, [fol. 11] 1937 and said appeal is allowed on the same day.

IN UNITED STATES DISTRICT COURT

MEMORANDUM—June 18, 1937

SWEENEY, J.:

In this suit, which is for the recovery of federal excess profits and income taxes alleged to have been erroneously assessed and collected by the United States, the Govern-

ment first filed a general denial, and later filed a motion to dismiss, basing that motion upon the question of jurisdiction.

Claims for refund of the taxes paid were seasonably filed with the Commissioner of Internal Revenue, and were rejected on March 22, 1927. On March 21, 1929, the plaintiff filed, in the office of the clerk of this court, the petition now under consideration. A copy of it was not served on the United States Attorney until March 25, 1929. Notice of the filing of the petition was mailed to the Attorney General on the same date. On March 28, 1929, the plaintiff filed with the court an affidavit of the service and mailing of notice as set forth above.

The Government contends that the court is without jurisdiction in this case, because the plaintiff has failed to comply with the terms of the legislation by which the United States consented to be sued in cases of this type.

The motion to dismiss brings up the following questions: (1) Whether an action against the United States for the refund of taxes was "begun within two years after the disallowance" of the claim for refund, within the meaning of Section 3226 of the Revised Statutes, as amended, when a petition was filed prior to the expiration of the two-year period and a copy of the petition was served on the United States Attorney, and notice mailed to the Attorney General, three days after the statutory period had elapsed, and (2) whether possible objection to the maintenance of the suit, on the ground that the petition was not served until three days after the expiration of the period of limitations, was waived by the defendant by the filing of a general denial and the failure to raise the objection until more than eight years after the filing of the petition.

Section 3226 of the Revised Statutes provides that no [fol. 12] suit or proceeding for the refund of taxes may be begun after two years from the date of the disallowance of the claim for refund. That statute is silent as to the mode of procedure to be adopted in beginning or commencing a suit or proceeding. 28 U. S. C. A. Sections 762, 763, however, provide that in such suits the plaintiff shall file a duly verified petition in the office of the clerk of courts having jurisdiction of the case, and that the plaintiff shall cause a copy of his petition, thus filed, to be served upon the District Attorney of the United States in said district, and

shall mail a copy of same to the Attorney General of the United States, and shall thereupon cause to be filed an affidavit of such service. Section 763 provides further that the District Attorney, upon whom such service is made, shall appear and defend the interests of the United States, and file proper pleadings within sixty days of such service of the petition upon him.

Procedure set forth in consent legislation must be strictly followed in order to secure jurisdiction. Walton v. United States, 73 F. (2d) 15, 17.

While I can find no case directly in point, I believe that I am bound by the reasoning and utterances of the court in this and other circuits where it has been "uniformly held that the suit cannot be regarded as commenced until all the requirements of the statute have been met or at least until a copy of the petition has been served on the United States attorney". Spencer v. United States, 14 F. Supp. 46, 47. See also Miller v. United States, 11 F. Supp. 924, 925; Walton v. United States, 73 F. (2d) 15, 18.

The facts in this case show a closer compliance with the requirements and conditions of the statute than in the cases cited herein, and I feel that the case is so close to the line that the jurisdictional question should be finally decided before a trial on the merits.

I therefore find and rule that this court has no jurisdiction to entertain this suit because of the plaintiff's failure to comply with 28 U. S. C. A. Sections 762, 763.

After the Government had filed its general denial, which was in May of 1929, this case remained inactive until January 22, 1931, when counsel for the plaintiff withdrew their appearance. In February of 1931 new counsel appeared, [fol. 13] and again on June 25, 1931, further counsel appeared for the plaintiff. The case again remained inactive until April 13, 1937, when present counsel entered their appearance for the plaintiff. On May 4, 1937, the Government's motion to dismiss was filed. Apparently no action was taken by either side during the eight years to bring this case to trial. The lapse of time has in no wise harmed the defendant, even if it could be held that any Government official had the right to waive the jurisdictional question. I am of the opinion that Pacific Mills v. Nichols, 72 F. (2d) 103, controls the effect of the Government's having filed its general denial, and later raising the question

of jurisdiction. Since the jurisdictional question rests wholly upon the terms and conditions which the Government has set forth as a condition upon which suit may be brought, such terms and conditions cannot be enlarged by any Government official or employee either by affirmative or negative acts. See also Finn v. United States, 123 U. S. 227.

The Government's motion to dismiss is therefore allowed.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF EXCEPTIONS—Filed July 1, 1937; Allowed July 20, 1937

This is an action against the United States under United States Code, Title 28, Section 41(20), for the recovery of income and excess profits taxes for the calendar years 1917 to 1921, inclusive, alleged to have been erroneously and illegally collected from the plaintiff. The petition was filed March 21, 1929, copies were served on the United States Attorney and mailed to the Attorney General on March 25, 1929, and an affidavit of service was filed on March 28, 1929. It was alleged in the petition that claims for refund of the taxes in question had been rejected by the Commissioner of Internal Revenue on March 22, 1927. The respondent entered its appearance by the United States Attorney, and filed its answer of general denial on May 16, 1929.

The pleadings, affidavit of service and docket entries are referred to and made a part of this bill of exceptions.

On May 4, 1937, prior to any hearing on the merits of the case, the respondent filed a motion to dismiss plaintiff's petition on the ground that the court was without jurisdic-
[fol. 14] tion to hear and determine the cause of action in that the cause of action set forth in the petition was barred by the provisions of Section 3226 of the Revised Statutes of the United States as amended by Section 1113 (a) of the Revenue Act of 1926.

On May 11, 1937, the case was heard before Honorable George C. Sweeney, District Judge, upon the respondent's motion to dismiss.

On June 18, 1937, the court (Sweeney, J.) rendered its decision, holding that it had no jurisdiction to entertain the

suit, and allowed the respondent's motion to dismiss. The memorandum opinion of the Court is referred to and made a part of this bill of exceptions. The plaintiff duly excepted in open court to said ruling and to the allowance of said motion.

The above constitutes all the evidence and facts relevant to any exceptions taken by the plaintiff.

The plaintiff tenders and presents the foregoing as its bill of exceptions and prays that the same may be settled and allowed.

Bates Manufacturing Company, by Charles B. Rugg, its Attorney.

Assented to: Francis J. W. Ford, United States Attorney, by Arthur L. Murray, Special Assistant to the United States Attorney.

July 20, 1937. The foregoing bill of exceptions is allowed.
George C. Sweeney, District Judge.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ASSIGNMENTS OF ERRORS—Filed July 20, 1937

Now comes Bates Manufacturing Company, plaintiff in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of this court entered on the eighteenth day of June, 1937:

1. The court erred in holding that a suit against the [fol. 15] United States under United States Code, Title 28, Section 41 (20), cannot be regarded as commenced until a copy of the petition has been served on the United States Attorney.

2. The court erred in holding that the plaintiff had failed to comply with the provisions of United States Code, Title 28, Sections 762 and 763.

3. The court erred in holding that it had no jurisdiction to entertain this suit.

4. The court erred in holding that the respondent had not waived its objection to the maintenance of the action by filing a general denial and failing to raise the objection until more than eight years after the filing of the petition.

5. The court erred in allowing the respondent's motion to dismiss.

Bates Manufacturing Company, by Charles B. Rugg, its Attorney.

RECITAL AS TO DEPOSIT IN LIEU OF BOND

On the said twentieth day of July, A. D. 1937, the sum of two hundred fifty dollars ($250) was deposited by the plaintiff in lieu of bond on appeal.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DOCKET ENTRIES

Mar. 21, 1929. Petition filed.
28, Affidavit of service of petition filed.
May 16, Answer filed.
Jan. 22, 1931. Appearance of Goulston & Storrs and David H. Greenberg for plaintiff filed.
Feb. 9, Appearance of Edward A. Counihan, Jr., for plaintiff filed.
June 25, Appearance of E. H. Maxcy for plaintiff filed.
Jan. 2, 1932. Dismissed without prejudice and without costs for lack of prosecution under General Order of Sept. 19, 1922.

[fol. 16]

Oct. 16, 1934. Petition for leave to file a bill of review filed.
16, Brewster, J. Petition allowed, leave to file bill of review granted.
May 28, 1935. Restored and reopened by Final Decree in Equity No. 4049, entered May 28, 1935.

Dec.	29, 1936.	Plaintiff's motion to exempt case from operation of Rule 34, assented to, filed.
	29,	Brewster, J. Motion allowed, case accordingly exempted from operation of Rule 34.
Apr.	13, 1937.	Appearance of Charles B. Rugg and Ropes, Gray, Boyden & Perkins for plaintiff filed.
May	4,	Respondent's motion to dismiss filed.
	11,	Sweeney, J. Hearing on respondents motion to dismiss for lack of jurisdiction; taken under advisement.
June	18,	Sweeney, J. Memorandum on respondent's motion to dismiss:—Motion to dismiss allowed; plaintiff excepts to allowance of motion to dismiss and to the finding and ruling that the court has no jurisdiction. Memo. filed.
July	1, 1937.	Plaintiff's bill of exceptions filed, assented to.
	20,	Sweeney, J. Plaintiff's bill of exceptions allowed.
	20,	Defendant's motion for judgment filed.
	20,	Sweeney, J. Motion allowed, judgment accordingly for the defendant.
July	20, 1937.	Plaintiff's petition for appeal filed.
"	" "	Plaintiff's assignment of errors filed.
"	" "	$250. deposited by plaintiff in lieu of bond on appeal.
"	" "	Sweeney, J. Plaintiff's appeal allowed.
"	" "	" J. Citation on appeal issued, retble. in U. S. Circuit Court of Appeals August 19, 1937.

Recital as to Citation and Service

A citation on appeal was issued on July 20, 1937, being made returnable in the United States Circuit Court of Appeals on August 19, 1937. Service of said citation was duly acknowledge-.

[fols. 17-18] Clerk's certificate to foregoing transcript omitted in printing.

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, September 18, 1937, is here omitted. A. I. Charron, Clerk.]

[fol. 19] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1937

No. 3280

BATES MANUFACTURING COMPANY, Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA, Defendant, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson and Morton, JJ.

OPINION OF THE COURT—Filed December 8, 1937

BINGHAM, J.:

This is an appeal from a judgment of the federal District Court for Massachusetts in favor of the defendant. The plaintiff brought an action to recover income and excess profits taxes alleged to have been erroneously and illegally assessed and collected for the years 1917, 1918, 1919, 1920, and 1921, amounting to $313,249.71. Its petition was filed in the District Court on March 21, 1929. May 16, 1929, the defendant filed an answer denying every material allegation of the petition. January 2, 1932, the petition was dismissed without prejudice for lack of prosecution. May 28, 1935, a bill of review having been filed and allowed, the case [fol. 20] was restored to the docket. May 4, 1937, the defendant filed a motion to dismiss the petition on the ground that the District Court was without jurisdiction to hear and determine the cause, alleging that the petition was barred by the provisions of Section 3226 of the Revised Statutes, as amended by Section 1132 of the Revenue Act of 1926.

June 18, 1937, the court granted the motion to dismiss, and a judgment of dismissal having been entered on July 20, 1937, this appeal was taken.

From the allegations of the petition it appears that the taxes in question were duly paid; that the collectors who collected the taxes were not in office at the time of the filing of the petition; that claims for refund were seasonably filed with the Commissioner and were rejected on March 22, 1927; that on March 21, 1929, the plaintiff filed the petition in question in the office of the clerk of the District Court for Massachusetts; that on the 25th of March, 1929, a copy of the petition was served, by the then attorney for the plaintiff, upon the District Attorney for the District of Massachusetts; that on the same day (March 25) a copy of the petition and notice of its filing were sent by registered letter to the Attorney General of the United States; and that, on March 28, 1929, an affidavit of the service and mailing of notice as therein stated was filed with the court.

The applicable statutes under which this controversy arises are the following: Section 3226 of the Revised Statutes, as amended by Section 1113 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116; United States Code, Title 28, sections 41 (20) and 762 and 763. Section 3226 reads as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions [fol. 21] of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or

proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Title 28, Sections 41 (20) and 762 and 763 of the United States Code are as follows:

"Section 41 (Judicial Code, section 24, amended) Original Jurisdiction. The district courts shall have original jurisdiction as follows: * * *

(20) Suits against United States.—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector [fol. 22] of internal revenue at the time such suit or proceeding is commenced. * * *"

"§ 762. Petition in suit against United States.—The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money

or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

"§ 763. Same; service; appearance by district attorney. —The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. * * *"

The only question in the case here presented is whether the proceeding was begun within two years after the disallowance, on March 22, 1927, of the claims in question, the petition having been filed March 21, 1929, but not served until March 25, 1929.

The plaintiff concedes that if it had failed to file a verified petition within the two-year period no proceeding would have been begun against the United States within the meaning of Section 3226, as amended; but contends that such a proceeding is begun within that section if a verified petition [fol. 23] is filed in the District Court, without its having been served upon the District Attorney for the District within the prescribed time. In other words, that the mandatory provision of Section 762 as to filing is essential to the commencement of the proceeding, but the equally mandatory provisions of Section 763 as to service are not.

It is also conceded that the provisions of the Conformity Act (Sec. 724, Title 28, U. S. C. A.) requiring that the practice, pleadings and mode of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts

of the state within which the district court is held (Sec. 724), and that the laws of the several states, except where the constitution, treaties and statutes of the United States otherwise require or provide, shall be regarded as rules of decision in actions at common law in the court of the United States (Sec. 725), do not apply and govern the situation here presented. And it may well be so conceded for the practice, pleadings, forms and modes of proceeding in the courts of the state do not and could not provide the method of suing the United States or of service of process upon it in proceedings in a federal district court sitting as a court of claims; for suits against the United States can be maintained only by its consent and in the manner and subject to the restrictions that it may see fit to impose. Reid v. United States, 211 U. S. 529, 538; Kawananakoa v. Polyblank, 205 U. S. 349, 353. The bringing of such a suit is the exercise of a privilege and not of a right, and is subject to such restrictions and conditions as Congress may see fit to impose upon its exercise. Munro v. United States, 89 Fed. (2d) 614, 615.

But, notwithstanding these concessions, it is further contended that, inasmuch as the federal statutes do not specifically state when such a proceeding is begun in a district court, we should determine the question as a matter of general law, guided by the decisions of the courts of the states [fol. 24] and of England, and should find and rule that this proceeding was begun on the filing of the petition with the clerk of court.

We think it is a sufficient answer to this contention that this proceeding is against the United States over which the District Court is given special jurisdiction sitting as a court of claims (Reid v. United States, 211 U. S. 529, 538), and not an action or proceeding of a private nature against a corporation or individual over which it is given its ordinary and well understood jurisdiction as a District Court; and that if the statutes conferring such jurisdiction and conditioning the mode and manner of its exercise in terms, or by reasonable implication, impose requirements as to the bringing of such action or proceeding against the United States, those requirements must be complied with, or the District Court is without jurisdiction to entertain the proceeding.

Section 41 (20), above quoted, is the section conferring jurisdiction on the District Court over such a proceeding as

this and authorizes it to be brought against the United States for the recovery of an internal revenue tax, as the claim exceeds $10,000 and the collector by whom the tax was collected was out of office at the time the proceeding was commenced; and Sections 762 and 763 provide by implication, if not in express terms, the mode and manner a suit against the United States under Section 41 (20) shall be begun, namely, that the plaintiff shall file a duly verified petition, setting forth the name and residence of the plaintiff, the nature of his claim and the facts upon which it is based, and "*shall cause* a copy of his petition filed under Section 762 *to be served* upon the District Attorney of the United States in the District wherein the suit is brought." Both of these requirements are mandatory and are conditions precedent to the bringing of the proceeding against the United States and to conferring jurisdiction on the District Court under Section 41 (20); and, as service has not been had within the two years the action was not seasonably begun.

[fol. 25] It is objected that these sections do not state when the petition shall be served. The same is true as to when the petition shall be filed, but the implication from the language employed is that both acts shall be done before the action or proceeding is begun, and we so hold. See Munro v. United States (2d Circuit), 89 Fed. (2d) 614, 616; Creasy v. United States, 4 Fed. Supp. 175, 179; Spencer v. United States (Mass. District Court), 14 Fed. Supp. 46. See also Walton v. United States, 73 Fed. (2d) 15, where we think the court reached the correct result, but by a wrong course of reasoning; and Bachmann, Emmerick & Co., Inc., v. United States (So. Dist. N. Y. June 4, 1935), Prentiss Hall Tax Service, 1935, Par. 1479; see also Par. 1967.

It has been suggested that in the Court of Claims a proceeding against the United States is begun by the filing of a petition (U. S. C. Title 28, Sec. 262) and, as the proceeding is regarded as begun on the filing of a petition in that court, we should hold that a like proceeding in the district courts is begun when the petition is filed. It is not for us to determine why Congress did not make the same requirements in both courts as to when a proceeding is begun against the United States, but it did not. It may be suggested, however, that in the Court of Claims the United States is the only party against whom a suit may may there

be brought and there was no occasion for service of process upon the government, for its representative, the Attorney General, with his assistants, is required to appear in that court and defend all cases there brought (U. S. C. Title 28, Sec. 291) while, in the district courts, the United States is not the only party against whom suits may there be brought and hence Congress required service upon the district attorney as the representative of the goverament, as well as the filing of the petition in court.

Whether the mailing of a copy of the petition by registered letter to the Attorney General is or is not a condition to the bringing of the proceeding before it can be said that [fol. 26] it is begun, it is unnecessary for us to determine, for it appears that no service was had upon the District Attorney within the District prior to the expiration of the two-year period here in question.

The judgment of the District Court is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION—Filed December 8, 1937

MORTON, J. (dissenting):

I am unable to agree, and the question is of such general importance that I will state my views. It seems to me that the filing of the petition in the District Court stopped the running of the statute of limitations if followed up by service of process within a reasonable time. "A suit is commenced by the filing of the petition or bill with the honest intention to prosecute the suit diligently provided there is no detrimental or unreasonable delay in the subsequent issue or service of the process." Mount City Co. v. Castleman, 187 Fed. 921, 925. This is the settled rule in England, in the federal courts in this country, and in all the state courts except a few which have peculiar codes.

The present question is whether this general rule, which of course was well understood by Congress, was intended to be changed by the statutes authorizing suits against the United States. Rev. Stat. 1069, which was originally passed in 1863, was incorporated unchanged into the Judicial Code. (28 U. S. C. A. section 262.) It reads: "Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition set-

ting forth a statement thereof is filed in court, * * * within six years after the claim first accrues." In the Act conferring jurisdiction on the District Courts over such claims the language is, "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued." (28 U. S. C. A. § 41 (20)).

In the Court of Claims filing the petition has always constituted and still constitutes bringing suit; there is, I un- [fol. 27] derstand, no disagreement on this point. So the government's contention resolves itself into this, that a different rule of limitation applies in the District Courts from that which applies to the same cases when brought under the same statute in the Court of Claims, and that the rule which applies to these cases in the District Courts is different from the rule which applies to all other cases in those courts. Very explicit language should be required to lead to such a result. The statutes relied on as having this effect are found in 28 U. S. C. A. sections 761, 762, and 763. Section 761 provides: "The course of procedure for the district courts and the court of claims in cases under section 41, paragraph 20, (district courts) and section 250 (court of claims) of this title, in so far as applicable and not inconsistent with sections 762 to 765, * * * shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt." This section, it will be observed, explicitly refers to and adopts, with reference to claims against the government, the regular procedure "not inconsistent with sections 762 to 765." We are not here concerned with sections 764 and 765.

Section 762 reads:

"The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

This is a clear and adequate provision for the bringing of suits against the United States, following the same procedure which began as far back as the Act of 1863.

Section 763 reads as follows:

"The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district [fol. 28] attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. Should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court."

It will be observed that this section applies indifferently to district courts and to the Court of Claims and that it contains not one word making compliance with any of these directions a condition of beginning action. The condition on which my brethren rely in holding that suits in the District Courts are not begun until process is served is found only "by implication". It seems to me unsound to read into a statute such an important provision in that way and to hold that this modification applies to one of two cognate courts but not to the other. The provisions of section 763 do not seem to me to be conditions at all under which the United States consents to be sued. Those conditions in this class of cases are found in the revenue laws, that there shall be a claim of overpayment, a claim for refund filed and disallowed, etc. The provisions referred to relate to service of process, etc.,—a distinctly different thing, having

no relation to jurisdiction unless explicitly given such a relation. I believe it to be not uncommon for statutes authorizing suits against a government, state or federal, to contain provisions of this character stating on which official [fol. 29] service should be made. It is settled that "brought" in section 762 means filing a petition if the suit is brought in the Court of Claims. I do not think it means something else if the suit is brought in the District Court which has concurrent jurisdiction under the same statutes.

A number of the cases cited in the government's brief and relied on by the District Judge have nothing to do with tolling the statutes of limitation; they do not seem to me in point.

[fol. 30]. RECITAL AS TO HEARING

On October 14, 1937, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—December 8, 1937

This cause came on to be heard October 14, 1937, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, December 8, 1937, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed with costs.

By the Court, Arthur I. Charron, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter: Charles B. Rugg. File No. 42,128. U. S. Circuit Court of Appeals, First Circuit. Term No. 647. Bates Manufacturing Company, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed December 24, 1937. Term No. 647, O. T., 1937.